Supreme Court, U.S.
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No. 92-1202

IN THE

Supreme Court of the United States

October Term 1992

GARY KNOP, *et al.*,

Petitioners,

v.

KENNETH L. McGINNIS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Elizabeth Alexander
(Counsel of Record)
Adjoa A. Aiyetoro
David C. Fathi
Alvin J. Bronstein
National Prison Project
of the ACLU Foundation
1875 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20009
(202) 234-4830

Patricia A. Streeter
1816 One Kennedy Square
Detroit, MI 48226
(313) 962-1177

Attorneys for Petitioners

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON, D.C. 20036

QUESTIONS PRESENTED

Whether the Sixth Circuit erred in applying a higher standard than the "deliberate indifference" rule of City of Canton v. Harris, 109 S.Ct. 1197 (1989), to a claim under 42 U.S.C. §1983 for equitable relief against state defendants sued in their official capacity.

Whether the Sixth Circuit erred in vacating an injunction that was based on the district court's finding that supervisory officials had shown deliberate or reckless indifference in failing to respond to a policy or custom of racial harassment of prisoners by staff in the Michigan prison system.

LIST OF PARTIES

Petitioners Gary Knop, John Ford, William Lovett II, Ramando Valeroso, Gus Jansson, Pat Sommerville, Vernard Cohen, T. John Spytma, Robert Shipp, Butch Davis, Ron Mixon, Kerwin Cook, Scott Hicks, Robert Rose, Troy Roberts, and Virecce Gant II are persons who are or were confined at the State Prison of Southern Michigan, the Michigan Reformatory, the Riverside Correctional Facility, or the Marquette Branch Prison, and are representatives of the class of all persons confined at any one of these facilities.

Respondent Kenneth L. McGinnis is Director of the Michigan Department of Corrections. Respondent Dan L. Bolden is Deputy Director of Correctional Facilities Administration. Respondent John Jabe is Regional Prison Administrator for the Central Region. Respondent Pamela Withrow is Warden of the Michigan Reformatory.

Respondent John Hawley is Warden of the Marquette Branch Prison. Respondent James Pogats is Deputy Warden of the Reception and Guidance Center. Respondent John Makowski is Warden of the Riverside Correctional Facility.[1]

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[1] These respondents are the successors in office of Perry Johnson, Robert Brown, Dale Foltz, John Jabe, Theodore Koehler, John Prelesnik, and William Abshirer, respectively, and are automatically substituted for them pursuant to Sup.Ct.R. 35.3.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 977 F.2d 996 and is reprinted in the Appendix to this Petition (hereinafter "App."). The opinions of the United States District Court for the Western District of Michigan, reported at 667 F. Supp. 467 and 685 F. Supp. 636, are also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were issued on October 16, 1992. This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This case involves 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343.

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. §1343 provides in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> * * *
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance,

regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

STATEMENT OF THE CASE

A. General Background

This case, filed in 1984, sought injunctive relief under 42 U.S.C. §1983 to address a number of conditions and practices at the State Prison of Southern Michigan in Jackson, Michigan; the Michigan Reformatory in Ionia, Michigan; the Riverside Correctional Facility, also located in Ionia; and the Marquette Branch Prison in Marquette, Michigan.

The district court certified a plaintiff class consisting of all prisoners confined at any one of the prisons during the litigation. In 1986 the trial court severed certain issues for immediate trial, and a thirty-five day bench trial took place in 1986 and 1987.[2] The issues were whether defendants engaged in racial discrimination

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[2] Following trial on the severed issues, the plaintiffs ultimately dismissed the remaining claims.

with regard to prisoner job assignments and classification in violation of the Fourteenth Amendment, as well as certain legal access and Eighth Amendment health issues.

The district court subsequently issued an opinion finding several constitutional violations. See Knop v. Johnson, 667 F. Supp. 467 (W.D. Mich. 1987) (App. at 42-135). Of particular relevance here, the district court found that plaintiffs had proved an unconstitutional policy or custom of racial harassment directed at African-American prisoners by staff. App. at 123. In a separate opinion issued the following year, the district court ordered a remedy for the constitutional violations it had found. Knop v. Johnson, 685 F. Supp. 636 (W.D. Mich. 1988) (App. at 136-168).

The defendants appealed to the Sixth Circuit, which approved most of the district court's findings and conclusions.

However, the court of appeals vacated the district court's order of injunctive relief on the issue of racial harassment.[3]

B. The Racial Harassment Claim

The petitioners now seek a writ of certiorari to review the Sixth Circuit's disposition of the racial harassment claim.

After hearing the testimony of numerous witnesses, the district court found that correctional officers frequently harassed African-American prisoners with racial slurs such as "jungle bunny, black bastard, black nigger;" "niggers, black son-of-a-b's, black m.f.'s;" "smart ass nigger;" "you niggers are all alike;" "burrheads, rugheads, or walking brillo head;" "these black niggers from Detroit;" "your nigger mammy;" "half-

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[3] The court of appeals also reversed the district court's finding that denial of access to toilets and sinks violated the Eighth Amendment, as well as the remedy on legal access ordered by the district court, and remanded for further proceedings. App. at 24-25, 30-31, 33.

breed, half white boy, half nigger;" "take your black ass upstairs;" and "I will kill you, nigger." App. at 117. The racially motivated behavior by staff included yelling racial insults over a prison loudspeaker. Id.

The court emphasized that "the testimony quoted in this opinion is only a portion of the credible testimony I heard on the use of racial slurs, and other acts of racial harassment, by correctional staff," and found that use of racial slurs by staff was sufficiently frequent to subject African-American prisoners to "a constitutionally intolerable atmosphere of racial harassment." App. at 121-122. Moreover, the court heard "repeated, credible, testimony about certain correctional officers who use racial slurs on a consistent basis." App. at 123.

The defendants acknowledged that their staff uses racial slurs. App. at 123.

Nonetheless, defendants testified that they rarely, if ever, discipline staff members for engaging in racially discriminatory behavior. Id. The defendants presented no evidence that even officers who use racial slurs on a consistent basis had been the subject of disciplinary action. Id. The district court found that prisoner complaints about racial harassment were not addressed because "defendants almost uniformly demand substantiation, accept the staff officer's denial, and reject the grievance." Id.

Based on this testimony, the district court concluded that racial harassment of African-American prisoners represented a policy or custom of the Department of Corrections, adding that "[p]laintiffs presented an extremely strong case on this issue." App. at 123. Specifically, the district court found that the Department of Corrections "explicitly or implicitly

authorizes, approves, or knowingly acquiesces in the unconstitutional harassment of black inmates by certain staff officers." Id. The district court also found that the named defendants -- supervisory officers of the Department of Corrections who were sued in their official capacities -- "consciously, voluntarily, and with reckless indifference to the rights of black inmates have failed to implement policies that would prevent the situation from occurring, and affirmatively encourage its continuation." App. at 124.

None of these findings were reversed as clearly erroneous by the court of appeals. Nevertheless, the Sixth Circuit concluded that deliberate or reckless indifference of supervisory officials to racial harassment was insufficient to justify injunctive relief under 42 U.S.C. §1983:

> We have recognized that racial harassment by government employees can violate rights protected by the Equal Protection Clause.

> Supervisory officials, however, are not liable for harassment by their subordinates absent a showing that the supervisor encouraged the . . . misconduct or in some other way directly participated in it. The defendants' failure adequately to investigate claims of racial harassment in this case did not, in our view, rise to the level of "encouragement."

App. at 32. (Internal quotation marks and citations omitted). The Sixth Circuit's opinion did not even address, let alone apply, this Court's decision in City of Canton v. Harris, 109 S.Ct. 1197 (1989).

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER THAT CONFLICTS WITH PRINCIPLES ANNOUNCED BY THIS COURT IN CITY OF CANTON v. HARRIS

A. Introduction

In recent years, this Court has frequently considered the meaning of the phrase "policy or custom" under 42 U.S.C.

§1983.[4] While most of this Court's cases have considered this issue in the context of municipal liability for damages, closely related issues also arise in injunctive actions and in actions against state defendants.

This Court's leading case on the standards for finding a municipal "policy or custom" in the absence of a formally promulgated policy is City of Canton v. Harris, 109 S.Ct. 1197 (1989). Under City of Canton, a municipality is liable for violations of the Constitution if city policymakers are "deliberately indifferent"

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[4] See City of Canton v. Harris, 109 S.Ct. 1197, 1203 (1989): "Thus, our first inquiry in any case alleging municipal liability under §1983 is the question of whether there is a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation. The inquiry is a difficult one; one that has left this Court deeply divided in a series of cases that have followed Monell [v. New York City Dept. of Social Services, 436 U.S. 658 (1978)][.]" The footnote accompanying the text lists a number of cases decided by the Court on this issue.

to the consequences of unconstitutional actions by their subordinates.

In this case, the trial court found that the state defendants were consciously or recklessly indifferent to a policy or custom of racial harassment of African-American prisoners. Without disturbing these factual findings, the court of appeals nonetheless reversed the conclusion that there had been a constitutional violation. This Court should grant certiorari to determine if factual findings sufficient to establish municipal liability under City of Canton are also sufficient to support the issuance of an injunction against state officers.

B. Liability of Municipal and State Defendants Under 42 U.S.C. §1983

Except for the differences between state and local defendants necessarily stemming from the effects of the Eleventh Amendment, this Court has applied the same

principles in both sets of cases under 42 U.S.C. §1983.[5] For example, in Monell v. New York City Dept. of Social Serv., 436 U.S. 658 (1978), the Court's analysis of the scope of municipal liability turned on the general meaning of §1983:

> Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the constitution, local governments, like every other §1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though

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[5] The Eleventh Amendment affords state officers no protection against a federal court injunction requiring them to conform their conduct to the demands of the Constitution. See Ex Parte Young, 209 U.S. 123 (1908). Thus, with regard to injunctive relief under §1983, municipal defendants and state defendants stand on the same footing.

> such a custom has not received formal approval through the body's official decisionmaking channels. . . . Congress included customs and usages [in §1983] because of the persistent and widespread discriminatory practices of state officials . . . . Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.

Id. at 690-691 (internal quotation marks, footnote omitted; emphasis added).

Similarly, cases involving state officials as defendants have freely cited cases involving local defendants to elucidate §1983 principles. See, e.g., Kentucky v. Graham, 473 U.S. 159, 166 (1985):

> [I]n an official-capacity action, however, . . . a governmental entity is liable under §1983 only when the entity itself is a "moving force" behind the deprivation, Polk County v. Dodson, 454 U.S. 312, 326, 102 S.Ct. 445, 454, 70 L.Ed. 2d 509 (1981) (quoting Monell, supra, 436 U.S. at 694, 98 S.Ct., at 2037); thus, in an official capacity suit the entity's "policy or custom" must have played a part in the violation of federal law. Monell,

> supra, Oklahoma City v. Tuttle, 471 U.S. 808, 817-818, 105 S.Ct. 2427, 2433, 85 L.Ed. 2d 791 (1985), id., at 827-828, 105 S.Ct. at 2437, 2438 (Brennan, J., concurring in judgment).

(footnote omitted). See also Hafer v. Melo, 112 S.Ct. 358, 361-362 (1991).

C. City of Canton and the "Deliberate Indifference" Standard

This Court has elaborated on the holding in Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 694 (1978), that a municipality is liable for injuries inflicted as a result of its "policy or custom." When the specific act causing constitutional harm does not result from a formal municipal policy or a specific decision by an identified policymaker, the municipality is nonetheless liable for its "policy or custom" if policymakers have been "deliberately indifferent" to the consequences of actions by subordinate employees.

As the Court explained in City of Canton:

> [I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to be deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

109 S.Ct. at 1205 (footnotes omitted).

An accompanying footnote provided further guidance:

> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

Id. at n.10.

Justice O'Connor's concurring opinion in City of Canton also contained an extended discussion of the governing standard:

> [M]unicipal liability for failure to train may be proper where it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. In such cases, the need for training may not be obvious from the outset, but a pattern of constitutional violations could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements. The lower courts that have applied the "deliberate indifference" standard we adopt today have required a showing of a pattern of violations from which a kind of "tacit authorization" by city policymakers can be inferred. See, e.g., Fiacco v. City of Rensselaer, 783 F.2d 319, 327 (CA2 1986) (multiple incidents required for finding of deliberate indifference); Patzner v. Burkett, 779 F.2d 1363, 1367 (CA8 1985)("[A] municipality may be liable if it had notice of prior misbehavior by its officers and failed to take remedial steps amounting to deliberate indifference to the offensive acts"); Languirand v. Hayden, 717 F.2d 220, 227-228 (CA5 1983)

> (municipal liability for failure to train requires "evidence at least of a pattern of similar incidents in which citizens were injured or endangered"); Wellington v. Daniels, 717 F.2d 932, 936 (CA4 1983)("[A] failure to supervise gives rise to §1983 liability, however, only in those situations where there is a history of wide-spread abuse. Only then may knowledge be imputed to the supervisory personnel").

Id. at 1209.

D. Under City of Canton, the Sixth Circuit Erred in Reversing the District Court's Finding of a Constitutional Violation

In this case, the trial court found that the racial harassment of African-American prisoners represented a policy or custom of the Department of Corrections. This conclusion was supported by findings that the defendant supervisory officials admitted that officers harassed prisoners with racial slurs, but were consciously and recklessly indifferent to the problem.[6] The

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[6] In §1983 cases, the courts of appeals have treated as equivalent the terms "deliberate indifference," "reckless

(continued...)

court of appeals did not disturb these findings, which fit comfortably within the Court's discussion in City of Canton of findings that would justify liability: a

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[6](...continued)
indifference," "conscious indifference," and "callous indifference." See, e.g., Doe v. Taylor Independent School District, 975 F.2d 137, 142 (5th Cir. 1992)(the Constitution may be violated when public officials act with "deliberate (or conscious) indifference"); Crawford-El v. Britton, 951 F.2d 1314, 1319 (D.C. Cir. 1991) ("deliberate or reckless indifference"); Colburn v. Upper Darby Township, 946 F.2d 1017, 1024 (3d Cir. 1991) (declining to distinguish between "reckless indifference" and "deliberate indifference"); Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1145 (3d Cir. 1990)("[t]he deliberate indifference standard requires a showing...that the state actor was recklessly indifferent, grossly negligent, or deliberately or intentionally indifferent"); Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 796-797 (1st Cir. 1990) ("reckless or callous indifference"). See also Smith v. Wade, 461 U.S. 30, 56 (1983) (punitive damages are appropriate under §1983 when state officers act with "reckless or callous indifference"); Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976) (characterizing the "callous indifference" standard of Newman v. Alabama, 503 F.2d 1320, 1330 n.14 (5th Cir. 1974), cert. denied, 421 U.S. 948 (1975), as "not inconsistent with the standard of deliberate indifference").

municipality would be liable under §1983 when its employees so often violated constitutional rights that the need for corrective action must have been obvious to policymakers. City of Canton, 109 S.Ct. at 1205 n.10.

The four cases cited in Justice O'Connor's concurring opinion in Canton as exemplifying the application of the standard for municipal liability also support the district court's finding of a constitutional violation in this case. See 109 S.Ct. at 1209. In Fiacco v. City of Rensselaer, N.Y., 783 F.2d 319 (2d Cir. 1986), the evidence of a policy or custom of non-supervision of police officers consisted of evidence of other claims of police brutality and the city's inadequate procedures for handling such claims. In Patzner v. Burkett, 779 F.2d 1363, 1367 (8th Cir. 1985), the court held that a municipality may be liable if it had notice of prior

misbehavior by its officers and failed to take remedial steps, amounting to deliberate indifference to the offensive acts. See also Languirand v. Hayden, 717 F.2d 220, 227-228 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984) (municipal liability requires a pattern of similar incidents in which persons were injured by misconduct of the city employees, or that serious incompetence or misbehavior was general or widespread); and Wellington v. Daniels, 717 F.2d 932, 936 (4th Cir. 1983) (a failure to supervise gives rise to §1983 liability only when there is a history of widespread abuse so that knowledge may be imputed to the supervisory personnel).

In short, the district court found that petitioners met the requirements for proving a constitutional violation under City of Canton's "deliberate indifference"

standard.[7] In reversing the district court, the court of appeals required the petitioners to meet a higher standard. See App. at 32 (petitioners failed to show "encouragement" of racial harassment by supervisory officials).

City of Canton dealt with liability for damages rather than injunctive relief. However, having met the conditions for damages liability under City of Canton, petitioners, a fortiori, also met the standard for injunctive relief.

Indeed, there are substantial reasons for imposing a standard for the issuance of an injunction that is lower than the standard for damages liability. In damages cases involving governments or individual officials, the Court has been concerned that liability not be imposed absent an

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[7] Of course, City of Canton was not yet decided when the district court issued its opinion on August 10, 1987. See App. at 42.

appropriate degree of fault on the part of the defendant. See, e.g., Monell, 436 U.S. at 691-693 (discussing municipal liability in terms of tort concepts); City of Canton, 109 S.Ct. at 1204 (discussing degree of fault appropriate to support municipal liability). This concept of fault as a prerequisite to liability makes policy sense in damages cases.

Fault-based liability makes less sense in injunctive actions. If a state action is violating constitutional rights in a manner that can be cured by an injunction, all that should be legally relevant is that the defendant acts under color of law, not that the defendant is deliberately indifferent to the violation. See 109 S.Ct. at 1205.

For example, assume that a school principal segregated grade school students by race. The school principal would not be a final decisionmaker under Pembaur v. City of Cincinnati, 475 U.S. 469 (1986).

Therefore, under Pembaur, the segregation would not automatically constitute a "policy or custom" sufficient to impose liability in damages upon the school district. A school child, however, is still entitled to damages from the principal in his or her personal capacity for the unconstitutional act. Similarly, the school child is entitled to an injunction against this violation of the Fourteenth Amendment, without a showing of deliberate indifference by the school board. The school child's constitutional rights are violated, regardless of whether the school board tacitly or explicitly authorizes the violation of rights, and the plaintiff is entitled to an immediate remedy. Any other rule limiting injunctions under §1983 would, at best, represent something akin to an exhaustion of remedies requirement. Section 1983, of course, includes no such requirement. See Patsy v. Bd. of Regents, 457 U.S. 496 (1982), and McNeese v. Bd. of

Education, 373 U.S. 668 (1963) (school children need not exhaust state administrative remedy to challenge racial segregation).

Moreover, if racial segregation of school rooms within a school district were pervasive enough to amount to a "policy or custom," the school board or other final decisionmaker would be an appropriate defendant to enjoin. This would be so regardless of the degree of fault of the school board. While it is relevant to the imposition of damages whether the school board's conduct with regard to the "policy or custom" was intentional, deliberately indifferent, or merely negligent, it does not follow that the degree of fault on the part of the school board should determine whether an injunction should issue to stop a patently unconstitutional "policy or custom."

II. THE COURTS OF APPEALS HAVE ADOPTED APPROACHES TO THIS ISSUE THAT ARE SHARPLY AT ODDS WITH THAT OF THE SIXTH CIRCUIT

With the exception of the decision below, the courts of appeals that have considered the standards for relief against state officials have applied a standard consistent with that developed in City of Canton.

In Sample v. Diecks, 885 F.2d 1099 (3d Cir. 1989), the court of appeals considered whether a former prisoner could sue for being detained beyond the expiration of his sentence. The court held that the possible liability of the Commissioner of Corrections had to be determined under the standards articulated in City of Canton, including whether there was a custom or practice and whether the Commissioner knew of the risk and was nevertheless indifferent to it. Because City of Canton was decided after the proceedings in the trial court, the court of

appeals remanded for application of City of Canton.

In Wilks v. Young, 897 F.2d 896 (7th Cir. 1990), the plaintiff was a former prisoner seeking damages for the alleged failure of prison officials to prevent an assault. The court of appeals reversed a jury verdict in favor of the prison officials and remanded for further proceedings. The court of appeals, citing City of Canton, ruled that the district court had erred in failing to give a requested instruction on the possible liability of supervisory officials.

In Greason v. Kemp, 891 F.2d 829, 838 (11th Cir. 1990), the court of appeals cited City of Canton in the course of holding that jury questions existed as to whether a supervisory prison official could be liable for deliberate indifference based on his failure to institute corrective procedures.

In Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 561-562 (1st Cir. 1989), the court of appeals applied a deliberate indifference standard to affirm a jury award against an official of the Department of Police for the Commonwealth of Puerto Rico based on the official's failure to supervise his subordinates.

See also Holt v. Caspari, 923 F.2d 103, 106 (8th Cir. 1991), rev'd on rehearing on other grounds, 961 F.2d 1370 (8th Cir. 1992) (prison supervisor would be liable for failure to take action, amounting to deliberate indifference or a tacit authorization of a process violating constitutional rights), and Ting v. U.S., 927 F.2d 1504, 1512 (9th Cir. 1991) (applying City of Canton standard for supervisor liability to Bivens[8] claims).

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[8] Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

All of these decisions are inconsistent with the approach of the court of appeals below. Had the Sixth Circuit applied City of Canton in this case instead of the higher "encouragement" standard, it would have affirmed the district court on the issue of racial harassment. These differing approaches by the lower courts demonstrate that clarification of the law on this point is needed.

CONCLUSION

For all the reasons set forth herein, petitioners urge that the Court grant certiorari.

Respectfully submitted,

Elizabeth Alexander
(Counsel of Record)
Adjoa A. Aiyetoro
David C. Fathi
Alvin J. Bronstein
National Prison Project
of the ACLU Foundation
1875 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20009
(202) 234-4830

Patricia A. Streeter
1816 One Kennedy Square
Detroit, MI 48226
(313) 962-1177

Attorneys for Petitioners

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